Goon Choy Fook @ Yoon Choy Fook v Lai Poh See

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)-1611 OF 2011
RAMLY ALI, APANDI ALIAND ANANTHAM KASINATHER JJCA
7 JUNE 2012

Civil Procedure — Damages — Award of — Damages claimed premised upon cause of action for fraud — Fraud not proved — Whether trial court wrong to have granted damages after dismissing claim — Whether claim for damages proved in any event

The respondent bought a piece of land with a double-storey house thereon ('the property') from a developer. The house was paid for by a man known as 'hubby' whom the respondent considered to be her husband. Several years later hubby sold the property to the appellant and on hubby's request the respondent signed the sale and purchase agreement ('SPA') and memorandum of transfer of the property in favour of the appellant. The property was eventually registered in the appellant's name. The respondent later filed an action in the High Court to declare that she was the rightful owner of the property and that the SPA and memorandum of transfer were null and void. She also prayed for special, general and aggravated damages against the appellant. The respondent's case was premised upon fraud and/or misrepresentation and/or forgery. The appellant counterclaimed for outstanding rental on the property because hubby had promised that he would be paid rent — the details of which were spelt out in cl 10 of the SPA — so long as he was kept out of vacant possession of the property. The High Court dismissed the respondent's claim holding that the transfer of the property to the appellant was valid and that as the respondent had willingly signed the SPA and memorandum of transfer at hubby's behest and request, there was no question of fraud. The trial judge, however, allowed the respondent's claim for damages to be assessed on the ground she 'may have suffered damages' for having been 'left high and dry' by hubby. The judge also allowed the appellant's counterclaim for delivery up of vacant possession of the property but dismissed his claim for rental on the ground that issue could only be corroborated by hubby who was not called to testify at the trial. The appellant appealed and the respondent cross-appealed the High Court's decision to the Court of Appeal.

Held, setting aside the award of damages granted to the respondent, upholding the High Court's decision dismissing the appellant's claim for rental and making no order as to costs:

(1) The evidence at the trial did not show an iota of evidence of fraud or

fraudulent misrepresentation by the appellant in the execution of the documents pertaining to the sale and transfer of the property. The trial judge therefore did not err in dismissing the respondent's main claim, namely the declaratory orders sought for. He had also correctly allowed the appellant's counterclaim for delivery up to him of vacant possession of the property (see para 12).

(2) The trial judge erred in allowing the claim for damages by the respondent. The claim for damages was premised upon the main cause of action for fraud and consequential to it. Once the court was not with the respondent on the tort of fraud, there could no longer be any basis to award damages. The substratum of the claim did not exist anymore (see para 15).

(3) There was no evidence of special damages suffered by the respondent. The trial judge's words that she 'may have suffered damages' was not only highly speculative but also unsupported by evidence (see para 14).

(4) There was ample evidence to justify the dismissal of the appellant's counterclaim for rentals. Since all dealings in connection with the sale and rental of the property were strictly between the appellant and hubby it was obvious that only hubby could throw light on the issue of the rentals. The failure to call hubby as a witness was fatal resulting in the invocation of adverse inference under s 114(g) of the Evidence Act 1950 (see para 17).

[Bahasa Malaysia summary

Responden telah membeli sebidang tanah dengan sebuah rumah dua tingkat ('hartanah tersebut') dibina di atasnya daripada pemaju. Rumah tersebut telah dibayar oleh seorang lelaki yang dikenali sebagai 'hubby' yang dianggap oleh responden sebagai suaminya. Beberapa tahun kemudian, 'hubby' telah menjual hartanah tersebut kepada perayu dan atas permintaan 'hubby', responden menandatangani perjanjian jual beli ('PJB') dan memorandum pindah milik hartanah untuk perayu. Hartanah tersebut akhirnya didaftarkan di atas nama perayu. Responden kemudiannya memfailkan tindakan di Mahkamah Tinggi untuk mengisytiharkan bahawa dia adalah pemilik sah hartanah tersebut dan bahawa PJB dan memorandum pindah milik tersebut adalah batal dan tidak sah. Dia juga memohon ganti rugi khas, am dan keterlaluan terhadap perayu. Kes responden berasaskan penipuan dan/atau salah nyataan dan/atau pemalsuan. Perayu menuntut balas sewa tertunggak ke atas hartanah kerana hubby telah berjanji kepadanya bahawa dia akan membayar sewa — butir-butir dinyatakan dalam kl 10 PJB — selagi dia dihalang daripada milikan kosong hartanah tersebut. Mahkamah Tinggi menolak tuntutan responden dengan memutuskan bahawa pemindahan harta kepada perayu adalah sah dan oleh kerana responden telah dengan rela menandatangani PJB dan memorandum pindah milik atas perintah dan

permintaan 'hubby', tiada persoalan penipuan. Walau bagaimanapun, hakim bicara membenarkan tuntutan responden bagi kerugian akan ditaksir atas alasan bahawa dia 'may have suffered damages' kerana telah 'left high and dry' oleh 'hubby'. Hakim juga membenarkan tuntutan balas perayu bagi penyerahan milikan kosong hartanah tersebut tetapi menolak tuntutan sewa atas alasan bahawa isu tersebut hanya boleh disokong oleh 'hubby' yang tidak dipanggil untuk memberi keterangan ketika perbicaraan tersebut. Perayu merayu dan responden merayu balas keputusan Mahkamah Tinggi ke Mahkamah Rayuan.

Diputuskan, mengetepikan award ganti rugi yang diberikan kepada responden, mengekalkan keputusan Mahkamah Tinggi dalam menolak tuntutan perayu untuk sewa dan tanpa membuat perintah terhadap kos:

(1) Keterangan ketika perbicaraan tersebut tidak sedikit pun menunjukkan keterangan mengenai penipuan atau penipuan salah nyataan oleh perayu dalam pelaksanaan dokumen-dokumen berkaitan dengan jualan dan pemindahan hartanah tersebut. Dengan itu, hakim bicara tidak terkhilaf dalam menolak tuntutan utama responden, iaitu perintah pengisytiharan yang dipohonnya. Beliau juga telah, dengan betul, membenarkan tuntutan balas perayu bagi penyerahan milikan kosong hartanah tersebut (lihat perenggan 12).

(2) Hakim bicara telah terkhilaf dalam membenarkan tuntutan ganti rugi oleh responden. Tuntutan untuk ganti rugi berlandaskan kepada kausa utama tindakan untuk penipuan dan perkara berbangkit berikutannya. Apabila mahkamah bersetuju dengan responden berkenaan tort penipuan, tidak terdapat apa-apa lagi yang boleh menjadi apa-apa asas untuk mengawardkan ganti rugi. 'Substratum' tuntutan tidak lagi wujud (lihat perenggan 15).

(3) Tiada bukti ganti rugi khas yang dialami oleh responden. Perkataan hakim bicara bahawa dia 'may have suffered damages' bukan sahaja sangat spekulatif tetapi juga tidak disokong oleh keterangan (lihat perenggan 14).

(4) Terdapat bukti yang mencukupi untuk memberi justifikasi bagi penolakan tuntutan balas perayu bagi sewa. Memandangkan kesemua urusan berkaitan dengan jualan dan sewaan hartanah adalah khusus antara perayu dan 'hubby', adalah jelas bahawa hanya 'hubby' yang boleh memberi input mengenai isu sewa. Kegagalan untuk memanggil 'hubby' sebagai saksi adalah menjejaskan, mengakibatkan pemakaian inferens bertentangan di bawah s 114(g) Akta Keterangan 1950 (lihat perenggan 17).]

Notes

For a case on award of damages, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) para 2492.

Cases referred to

Cho Choon Moi v Ngan Sew Tim [1986] 1 MLJ 34, SC (refd)
Datuk Jaginder Singh & Ors v Tara Rajaratham [1983] 2 MLJ 196, FC (refd)
Loke Yew v Port Swettenham Rubber Co Ltd [1913] AC 491, PC (refd)
PJTV Denson (M) Sdn Bhd & Ors v Roxy (M) Sdn Bhd [1980] 2 MLJ 136, FC (refd)
Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360; [1990] 1 CLJ 133, HC (refd)
Saminathan v Pappa [1981] 1 MLJ 121, PC (refd)
Tan Geok Khoon & Gerard Francis Robless v Paya Terubong Estate Sdn Bhd [1988] 2 MLJ 672 (refd)
Yong Tim v Hoo Kok Chong & Anor [2005] 3 CLJ 229, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 69(1)
Evidence Act 1950 ss 101, 114, (g)

Appeal from: Civil Suit No S22 NCVC–16 of 2010 (High Court, Kuala Lumpur)

Low Eu Thuan (Cheong Wai Meng & Van Buerle) for the appellant.
KK Loong (Wong & Chua) for the respondent.

Apandi Ali JCA:

INTRODUCTION

[1] This is an appeal by the appellant and cross-appeal by the respondent against parts of the decision of the High Court where part of the counterclaim by the appellant was dismissed. Both parties were dissatisfied with the decisions of the learned trial judge. The decisions were made after a full trial. For ease of reference we shall refer the parties as they were at the trial below, ie as the plaintiff and defendant, respectively.

BACKGROUND FACTS

[2] The plaintiff's action is basically for a declaration that the plaintiff is the rightful owner of a piece of land held under Pajakan Negeri No Pendaftaran 3992, No Lot 99753, Mukim Hulu Kinta, Daerah Kinta, Negeri Perak Darul Ridzuan together with a double storey semi-detached house erected thereon having the postal address of No 2, Solok Bekor 2, Taman Buluh Emas, 30100

Ipoh, Perak Darul Ridzuan ('the said property'). The plaintiff also seek for declaratory orders that a sale and purchase agreement dated 11 November 2005 of the said property and the transfer of the said property be declared null and void and of no effect. Consequential to the declarations sought, the plaintiff claimed for special and general damages and aggravated damages.

[3] From the pleadings in the statement of claim, the plaintiff's action is premised on the tort of fraud and/or misrepresentation and/or forgery. These can be seen in paras 49–50 of the plaintiff's statement of claim.

[4] The defendant's counterclaim is for rentals of the said property and premised on breach of contract, namely of cl 10 in the sale and purchase agreement dated 11 November 2005 between the plaintiff and the defendant.

[5] Briefly the factual matrixes of the case are as follows:

(a) it is not in dispute that the said property was purchased by the plaintiff from a developer as signified by a sale and purchase agreement dated 28 June 1999 and the purchase was financed by a housing loan from RHB Bank;

(b) it is also not in dispute that a gentleman known and referred to as 'hubby' paid for the said property. This hubby had a rather bizarre relationship with the plaintiff. The plaintiff considers hubby to be her husband, although not married to him and more perplexing, the plaintiff does not even know the name of this hubby. The plaintiff had a child with hubby but the man's name was not recorded in the birth certificate of the child. This hubby character is a close friend of the defendant. The defendant disclosed that hubby is one Yeoh Kok Wah @ Yong Ah Ku;

(c) since hubby purchased the said property for the plaintiff and paid for it, in law hubby is the beneficial owner of the said property;

(d) sometime on or about 11 November 2005 hubby sold the said the plaintiff executed a sale and purchased agreement together with the memorandum of transfer; and

(e) the said property was duly registered in the name of the defendant on 30 December 2009.

[6] The plaintiff filed the writ of summons in this action in the Kuala Lumpur High Court on 6 October 2010 claiming for declaratory orders pertaining to the sale and purchase agreement dated 11 November 2005 and the registration and title of the said property; and consequential to that also claims for damages.

FINDINGS AND DECISION OF THE HIGH COURT

[7] After a full trial, the learned judicial commissioner made the following findings:

(a) that the signing of the sale and purchase agreement with the defendant and the memorandum of transfer in favour of the defendant by the plaintiff were not tainted with fraud. This is so because:

(i) the plaintiff did not seriously challenge her signatures on the documents;

(ii) the plaintiff was prepared to live with hubby and was prepared to accept not knowing his identity and left the affairs of the said property to hubby;

(iii) the plaintiff went with hubby to the legal office of DW3, Kiew Lai Wah, an advocate and solicitor from M/s Krish & Kiew and sign the documents pertaining to the sale and transfer of the said property; and

(iv) the documents were signed by the plaintiff in the presence of DW3, who then attested them.

(b) that from the conduct of the plaintiff in signing the documents pertaining to the said property was at the behest and request of hubby, the plaintiff is estopped from raising the issue of fraud; and

(c) that since hubby had played a pivotal role in the entire transaction, the failure by the plaintiff to call hubby as a witness has triggered the adverse inference against her, under s 114(g) of the Evidence Act 1950.

[8] In conclusion, the learned judicial commissioner wrote in his grounds of judgment as follows:

> … I find as a fact the plaintiff consented and willingly adhered to whatever hubby said and the plaintiff's own evidence bears that out.
>
> For all the above reasons I found the transfer of the said property by the plaintiff to the defendant to be valid and the court dismissed the plaintiff's claim in the main.

[9] However on the plaintiff's claims for damages, the learned judicial commissioner allowed the claim and gave a one paragraph reasoning for doing so. The reasoning reads as follows:

> The court found the defendant was well aware of the position of the plaintiff and that the plaintiff occupied the said property and whilst the court may have negated a finding of fraud, the plaintiff has been left high and dry by hubby and for these reasons I made orders for assessment of damages that the plaintiff may have suffered before delivery up of vacant possession.

[10] The learned judicial commissioner allowed the defendant's counterclaim in respect of delivery of vacant possession of the said property by the plaintiff but stayed the delivery until completion of the assessment of the damages awarded to the plaintiff. The defendant's other counterclaim for rentals of the said property was dismissed. The reason given by the learned judicial commissioner in dismissing the claim for rentals is a one-liner, which reads as follows:

> 799. The court also dismissed the defendant counter claim with costs as the issue of rentals could only have been corroborated by hubby who was not subpoenaed to testify.

FINDING BY THIS COURT

[11] As the plaintiff's case is premised on the tort of fraud and or fraudulent misrepresentation we approach the appeal on the basis of such pleadings. Foremost in our mind, the legal positions of such pleading are to be appraised on the following guidelines:

(a) that the standard of proof for fraud is one of beyond reasonable doubt. This is trite law, as held by the Federal cases of:

(i) *Saminathan v Pappa* [1981] 1 MLJ 121; *Yong Tim v Hoo Kok Chong & Anor* [2005] 3 CLJ 229,
and by Supreme Court in *Cho Choon Moi v Ngan Sew Tim* [1986] 1 MLJ 34.

(b) that the issue of fraud is a question of fact (see *PJTV Denson (M) Sdn Bhd & Ors v Roxy (M) Sdn Bhd* [1980] 2 MLJ 136); and

(c) that fraudulent misrepresentation is a species of fraud and such an issue is also a question of fact

(i) (See *Loke Yew v Port Swettenham Rubber Co Ltd* [1913] AC 491; and

(ii) *Datuk Jaginder Singh & Ors v Tara Rajaratham* [1983] 2 MLJ 196).

[12] From the evidence adduced as the trial, both oral and documentary, it is clear that there is not an iota of evidence to show any taint of fraud or fraudulent misrepresentation by the defendant in the execution of the documents pertaining to the sale and transfer of the said property. On the other hand, there are evidence in rebuttal of the plaintiff's pleadings. It is our judgment that the learned trial judge has not erred in his findings on the issue of fraud and in deciding to dismiss the plaintiff's main claim, namely the declaratory orders sought for. Corollary to such findings and decision, it is also our judgment that based on the same facts and evidence, the learned trial judge

had correctly allowed the main prayer in the defendant's counterclaim, namely for the delivery of vacant possession of the said property to the defendant, by the plaintiff.

[13] However on the award of damages to the plaintiff, with respect, we could not agree with the learned judicial commissioner. The learned judicial commissioner's reason for awarding damages for the plaintiff because '… the plaintiff has been left high and dry by hubby and for these reasons I made orders for assessment of damages that the plaintiff may have suffered before delivery up of vacant possession'.

[14] It is our considered view that the learned judicial commissioner erred in allowing the claim for damages by the plaintiff. Our reasons are:

(a) upon perusal of the statement of claim it is, clear that the plaintiff is claiming three different types of damages, namely special and general damages, exemplary damages and aggravated damages. In his decision, the learned judicial commissioner granted two types of damages ie special damages and general damages and that both damages are to be assessed by court. Special damages have to be proved. There is no evidence on the special damages suffered by the plaintiff;

(b) in his grounds of judgment the learned judicial commissioner used the words 'may have suffered'. This is not only highly speculative but also not supported by any evidence;

(c) it is trite law that the burden of proving damages is always on the claimant (see *Tan Geok Khoon & Gerard Francis Robless v Paya Terubong Estate Sdn Bhd* [1988] 2 MLJ 672; *Popular Industries Ltd v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360; [1990] 1 CLJ 133). It is also in line with the provisions of s 101 of the Evidence Act 1950;

(d) upon a closer scrutiny of the pleadings, it is clear that whatever damages that the plaintiff is claiming is premised upon the main cause of action of fraud. The claim for damages is consequential to the alleged tort by the defendant. This can be seen by the wordings in para 54 of the statement of claim, which reads:

> Akibat daripada tindakan-tindakan Defendan seperti yang dinyatakan di atas, Plaintif telah mengalami kerugian-kerugian khas ('special damages') dan kerugian-kerugian am ('general damages').

[15] Wherefore, it is our judgment that once the court is not with the plaintiff on the tort of fraud, there can no longer be any basis for the award of damages to stand on. The substratum of the claim does not exist anymore.

[16] On the dismissal of the counterclaim by the defendant for the rentals of the said premises, it is our judgment that it is a decision based on findings of facts. That finding of fact is supported by evidence adduced at the trial. We find no reason to disturb such findings by the learned judicial commissioner.

[17] Eventhough the learned judicial commissioner gave only a one-liner reason in dismissing the defendant counterclaim, we agree with his reasoning. Acting on the empowering provisions of s 69(1) of the Courts of Judicature Act 1964, namely treating this appeal as a re-hearing, we find that these are ample evidence to justify the decision to dismiss the defendant's counterclaim for rentals. The evidence are:

(a) it is in the defendant's own witness statement that all dealings in connection with the said property were in the hands of the hubby. This includes the reason as to why cl 10 of the sale and purchase agreement between the plaintiff and the defendant was included. The relevant parts of the defendant's witness statement reads as follows:

> 10
>
> Q: Were there any other terms discussed with Mah?
>
> A: Yes, Yeoh told me that he might want to buy back the property in about 5 years time and suggested that in the event vacant possession cannot be delivered then monthly rental should be paid to me. He explained that he wants to buy another property for Lai who according to Yeoh is occupying the said property.
>
> 11
>
> Q: Was there any discussion on the amount of rental to be paid?
>
> A: Yes, Yeoh proposed the following rental to be paid to me if vacant possession cannot be given after the balance purchase price is paid:
>
> (a) Monthly rental to be RM900-00 for the first and 2nd year
>
> (b) Monthly rental to be RM1,000-00 for the 3rd and 4th year and
>
> (c) Monthly rental to be RM1,200-00 for the 5th and 6th year.

(b) there is then the evidence of a returned cheque for a sum of RM5,400 issued by the plaintiff in favour of the defendant that was supposed to be for the advanced six months rental of the said property. From evidence adduced by the defendant himself, it is clear that the arrangement for the payment of rentals was strictly between the defendant and hubby (Yeoh). The relevant part of the defendant's witness statement, that reflects such arrangement, reads as follows:

> 29
>
> Q: What did you do after the cheque was returned?

A: I spoke to Yeoh about the cheque returned and he told me he will get Lai Poh See to replace a cheque.

30

Q: Did you get a replacement cheque from Lai Poh See?

A: No. Between 2006 until middle of 2008 I often chased Yeoh for the replacement cheque.

(c) since all dealings in connection with the sale and rental of the said property were strictly between the defendant and hubby, it is obvious that only hubby can throw some light on the issue of rentals. Thus the failure to call hubby as a witness is fatal, resulting in the invocation of adverse inference under s 114 of the Evidence Act 1950.

DECISION AND CONCLUSION

[18] For the above reasons, we unanimously:

(a) held that there was no justification to award damages to the plaintiff and according allowed the plaintiff's appeal in part; and set aside the said award; and

(b) held that there were no merit in the defendant's cross-appeal for the rentals of the said property and uphold the High Court decision on that part of the judgment.

[19] In the circumstances of our decision, we are also unanimous that it is fair and reasonable, in exercising our discretion not to make any order as to costs. The deposits for the appeal and cross-appeal are to be refunded, respectively.

Award of damages granted to respondent set aside, High Court's decision dismissing appellant's claim for rental upheld and no order as to costs made.

Reported by Ashok Kumar